

DEPARTMENT OF JUSTICE
FRAUD AND CONSUMER PROTECTION DIVISION
Statutory Authority: 29 Delaware Code, Section 2521 (29 Del.C. §2521)

FINAL

ORDER

106 Home Improvement Services

Background, Summary of Evidence and Information Submitted, and Findings of Fact

The Consumer Protection Unit of the Delaware Department of Justice ("the Consumer Protection Unit") has the authority to enforce the Consumer Fraud Act (6 Del. C. § 2511 *et seq.*) and to promulgate regulations that implement or clarify it. The Fraud and Consumer Protection Division receives a large number of complaints about home improvement related issues each year. Specifically, the Fraud and Consumer Protection Division received approximately 80 complaints about home improvement related issues in 2021, approximately 200 complaints in 2022, and approximately 120 complaints in the first 7 months of the 2023. Additionally, the Consumer Protection Unit has undertaken several investigations into the conduct of home improvement contractors. Through the complaints and investigations, the Consumer Protection Unit has been able to identify practices that frequently harm consumers. Accordingly, on April 1, 2023, the Consumer Protection Unit published notice of a proposed regulation to the Consumer Fraud Act regarding home improvement services in the April 2023 edition of the Delaware Register of Regulations (the "proposed Regulation").

The Consumer Protection Unit held a public hearing on this regulation on May 24, 2023. Notice of this public hearing was published in the Delaware Public Meeting Calendar on April 12, 2023. Notice of this hearing was also posted in both *The News Journal* and *The Delaware State News* on April 21, 2023. From April 21 to April 26, 2023, the Consumer Protection Unit emailed the roughly 5000 contractors who were registered as Construction Contractors with the Department of Labor, in addition to several contractor groups and consumer groups, to give notice of the public hearing. A transcript of the public hearing can be found on the Consumer Protection Unit's website. The transcript includes the following exhibits: (1) the text of the proposed regulation; (2) the Regulatory Flexibility Analysis and Regulatory Impact Statement; (3) the verifications of publication; (4) the Notice of Public Hearing; and (5) the pre-hearing comment. The deadline to submit written comments to be considered at the public hearing was May 1st, and the general deadline to submit written comments to be considered for this regulation was on June 9, 2023. The Consumer Protection Unit thus satisfied all proper notice provisions.

The Consumer Protection Unit received one written comment about this regulation prior to the May 1st deadline for comments to be considered at the public hearing. The written comment came from a consumer who detailed their negative experience with a home improvement contractor.

The Consumer Protection Unit received four comments at the public hearing on May 24, 2023. The first speaker was a consumer, who described their experience with a home improvement contractor who attempted to defraud them. The next speaker was an emergency restoration services contractor. That speaker expressed general support for the regulation but requested that the Consumer Protection Unit consider the unique challenges facing emergency restoration services, especially regarding the three day right of rescission that is required for certain contracts. While Consumer Protection Unit understands the concerns highlighted by the contractor, this regulation does not expand the right of rescission in any way. Rather, Section 3.1.6 of the regulation merely requires a right to rescission to be disclosed *when such a right exists*. The next speaker was another consumer who described an experience in which they were deceived into entering into a contract and eventually were sued for collection even though no work had been done on their home. The final speaker was the Executive Director of a community advocacy group that expressed their support for the regulations, stating that the unscrupulous practices that this regulation seems to prevent can strip away the wealth that the consumers have built.

The Consumer Protection Unit received one comment after the May 1st deadline for comments to be considered at the public hearing. The written comment came from a home improvement contractor. In this comment, the contractor expressed concern about being bound by an estimated completion date that could be difficult to comply with due to their reliance on third parties. While this concern is noted, this regulation as proposed already accounted for such concerns in at least two different ways. First, this regulation does not require a completion date, as Section 3.1.2 allows a contractor to clearly and conspicuously disclose that there is no estimated completion date in lieu of putting an estimated completion date. Additionally, pursuant to Section 3.1.14, even if a contractor does not finish the home improvement by the estimated completion, it is still not unlawful as long as the delay is caused by events beyond the home improvement contractor's control or if the buyer agrees to the new date in writing. These exceptions address the concerns raised by the contractor.

Decision to Adopt the Regulation, Citation, and Effective Date

The public was given notice and an opportunity to provide the Consumer Protection Unit with comments on the proposed Regulation, both at a public hearing and in writing. The transcript of the public hearing, which is posted on the Consumer Protection Unit website, shall be considered part of the record. As detailed above, the proposed Regulation addresses the concerns raised by the contractors to the extent possible. Additionally, the proposed Regulation helps address the problems experienced by the consumers who offered public comments.

THEREFORE, IT IS ORDERED, that the proposed Regulation to the Consumer Fraud Act is adopted and shall be final effective November 1, 2023. This regulation shall be cited as 106 Home Improvement Services Regulation.

September 15, 2023
Date of signature

Marion Quirk
Director, Consumer Protection Unit

106 Home Improvement Services

1.0 Authority

- 1.1 Authority. The Director of the Division of Consumer Protection enforces the Consumer Fraud Act pursuant to the authority granted to that Director through 29 **Del.C.** §2520, and has the authority to promulgate rules and regulations to implement or clarify the statutes that the Division of Consumer Protection is charged to enforce or otherwise to carry out the purposes of those statutes pursuant to 29 **Del.C.** §§2520(6) and 2521. The Division of Consumer Protection has designated the Director of the Consumer Protection Unit to promulgate this regulation.
- 1.2 Scope. This regulation of the Consumer Fraud Act covers certain unlawful practices covering home improvement transactions but shall not cover new construction of single-family dwellings or rebuilding all or substantially all of an existing or preexisting single-family dwelling.
- 1.3 Construction. This regulation shall be liberally construed to effectuate the purposes of the Consumer Fraud Act, 6 **Del.C.** §2511, et seq.
- 1.4 Severability. If, for any reason, any section, subsection, sentence, clause, phrase, or provision of this regulation or the application thereof to any person or circumstance is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other sections, subsections, sentences, clauses, phrases, or provisions of its application to any other person or circumstance, and to this end each and every section, subsection, sentence, clause, phrase, or provision of this regulation is hereby declared severable.

2.0 Definitions

The following words and terms, when used in this regulation, have the following meaning:

"Buyer" means the buyer of home improvement merchandise from a home improvement contractor.

"Clearly and conspicuously" has the meaning set forth in 6 **Del.C.** §2731.

"Consumer Protection Unit" means the Consumer Protection Unit of the Department of Justice

"Home improvement" means any alteration, repair, addition, modification or improvement to any dwelling or the property on which it is situated, including but not limited to the construction, painting or coating, installation, replacement or repair of driveways, sidewalks, swimming pools, unattached structures, porches, kitchens, bathrooms, chimneys, fireplaces, stoves, air conditioning or heating systems, hot water heaters, water treatment systems, electrical wiring or systems, plumbing fixtures or systems, doors or windows, roofs, gutters, downspouts and siding.

"Home improvement contract" means a written agreement, including all amendments, modifications, and addenda thereto, between a home improvement contractor and a buyer and includes all agreements under which the home improvement contractor is to perform labor or render services for home improvements, or furnish materials in connection therewith.

"Home improvement contractor" means all persons, firms, partnerships, joint ventures, limited liability companies, and companies, their officers, representatives, agents, and employees, engaged in the trade or commerce of home improvement.

"Merchandise" has the meaning set forth in 6 **Del.C.** §2511.

"Person" has the meaning set forth in 6 **Del.C.** §2511.

3.0 Home Improvement Transactions

- 3.1 In connection with any home improvement transaction, it is an unlawful practice, as set forth in 6 **Del.C.** §2513(a) for any person to:

- 3.1.1 Fail to provide the buyer with a home improvement contract that describes, in a meaningful way, the merchandise purchased, the contract price together with all financing information or credit terms required by applicable law, any other terms required by this regulation, and any other material terms agreed by the parties, by the time performance is due from either party;
- 3.1.2 Fail to provide to the buyer in writing an approximate completion date for all home improvements in a home improvement contract unless the home improvement contract clearly and conspicuously discloses that no completion date is provided;
- 3.1.3 Fail to fill in all the relevant final terms in a home improvement contract before it is signed by the buyer;
- 3.1.4 Structure a home improvement contract in such a way as to require the buyer to sign or signify assent to a proposal before it is binding on the home improvement contractor;
- 3.1.5 Fail to include the home improvement contractor's name, address, telephone number, website (if any), and e-mail address in a home improvement contract;
- 3.1.6 Fail to include in a home improvement contract proper notification of the buyer's right to cancel the home improvement contract if required pursuant to 6 Del.C. §4404(2);
- 3.1.7 Fail to include in a home improvement contract all affirmations of fact, promises, or descriptions which constitute express warranties under 6 Del.C. §2-313 or would so constitute express warranties if the sale of goods only were involved;
- 3.1.8 Fail to disclose in a home improvement contract all delivery and installment charges;
- 3.1.9 Fail to clearly and conspicuously disclose in a home improvement contract that a warranty only covers a product and does not cover the installation or delivery of the product, when such is the case;
- 3.1.10 Fail to disclaim on a separate page of a home improvement contract that the home improvement contractor is not responsible for their oral representations, promises, or assurances, when it is the intent of the home improvement contractor that their oral representations, promises, or assurances not be binding;
- 3.1.11 Fail to provide the buyer with a summary of these regulations, as prepared by the Consumer Protection Unit, as published on the Consumer Protection Unit website, prior to the buyer signing a home improvement contract;
- 3.1.12 Include a liquidated damages provision in a home improvement contract that would provide the home improvement contractor with the same amount of liquidated damages regardless of the amount of work completed;
- 3.1.13 Misrepresent the binding nature of a home improvement contract, such as by representing that a home improvement contract is an estimate;
- 3.1.14 Fail to complete the home improvement by the completion date as stated in a home improvement contract unless such home improvement is delayed by events beyond the home improvement contractor's control or the buyer has agreed in writing to a later date;
- 3.1.15 Where the contract price is to be calculated on a "cost plus" basis, fail to clearly and conspicuously state this fact along with the method of calculating additions to cost and a good faith estimate of the final contract price;
- 3.1.16 Disclaim, exclude, modify or otherwise attempt to limit any warranty, including the warranties of merchantability and fitness for a particular purpose, or to exclude, modify or attempt to limit any remedy provided by law, including the measure of damages available, for a breach of warranty, express or implied, except in a clear and conspicuous manner accompanied by the buyer's initials;
- 3.1.17 Represent that the buyer or prospective buyer has been specially selected to receive a bargain, discount, or other advantage that will reduce the cost of the merchandise, when the offer is available to all customers similarly situated or is otherwise not the case;
- 3.1.18 Represent to a prospective buyer that their dwelling or building is to serve as a lure for prospective buyers, "model home," "advertising job," or other similar inducement, and that a reduced price is offered for that reason, if such is not the case;
- 3.1.19 Represent to a prospective buyer that the buyer is being given an introductory, confidential, closeout, going-out-of-business, factory, or wholesale price discount, if such is not the case;
- 3.1.20 Represent to a prospective buyer that a price discount is being made due to materials left over from another job, if such is not the case;
- 3.1.21 Represent to a prospective buyer that the offer is a test of the local market or a market survey if such is not the case;
- 3.1.22 Represent to a prospective buyer that the prices offered are discounted, if such is not the case;

- 3.1.23 Where models or other exemplars are used to show the merchandise to be provided or services to be offered, represent that such models or exemplars are current when they are not current or are discontinued;
- 3.1.24 Represent that the merchandise being offered are current or state of the art, when, in fact, they are not current or state of the art, or are discontinued;
- 3.1.25 Misrepresent the quality, capacity, character, nature, manufacturer, or composition of any merchandise;
- 3.1.26 Misrepresent or falsely state that the buyer's present equipment, materials, goods, fixtures, or property are dangerous, defective, or in need of repair or replacement;
- 3.1.27 Present to a buyer for signature, or otherwise attempt to induce a buyer to sign, any certificate of completion before the relevant home improvement is actually completed;
- 3.1.28 Induce or persuade a buyer or prospective buyer to sign any writing when the home improvement contractor knows or has reason to know that the buyer or prospective buyer is unable to read or write, cannot read the language in which the instrument is written, or, after reading the instrument, does not understand the terms of the instrument;
- 3.1.29 Mislead the prospective buyer or buyer into believing that the down payment or some other figure constitutes the full amount they will be obligated to pay, or to omit or exclude any other obligations, fees, charges or costs to the buyer;
- 3.1.30 Gain entry or access to a prospective buyer's home or property under the false guise of performing a governmental, public utility or other official inspection, or to falsely represent that the home improvement contractor is acting on behalf of or as an employee of any governmental entity or public utility;
- 3.1.31 Represent that the home improvement contractor is an employee, officer or representative of a manufacturer, importer, or any other person, firm, organization, or that such person, firm, or organization will assume some obligation in fulfilling the terms of the contract, when such is not the case.

27 DE Reg. 254 (10/01/23) (Final)